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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1943

No. 774

JACK BAEG,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

REPLY OF JACK BAEG, PETITIONER, TO THE ANSWER OF THE PEOPLE OF THE STATE OF ILLINOIS OBJECTING TO THE ISSUANCE OF A WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

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REPLY OF JACK BARG, PETITIONER, TO THE ANSWER OF THE PEOPLE OF THE STATE OF ILLINOIS OBJECTING TO THE ISSUANCE OF A WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Supreme Court of the United States:

I.

Reasons for filing reply to the Answer of the People of the State of Illinois.

We have carefully considered the Answer of the People of the State of Illinois, Respondent, objecting to the issuance of a Writ of Certiorari and its Brief in support thereof, and find that the Answer and Brief raised a host of minor controversies of mere details but we have been un-

able to find in either, Answer or Brief, answers to the propositions of law tendered by the petition and brief for the petitioner. These details we shall not attempt to meet, lest a particularized rebuttal by the petitioner, obscure the essential simplicity of the issues presented to this court for decision. We expressly desire to note that we do not concede that respondent is correct on the issues which are not developed in reply. Instead, we shall briefly call to the attention of this Honorable Court such matters which we believe sufficient to close the pleadings.

II.

The first contention of the respondent, that petitioner's claim of a federal constitutional right was not asserted in the trial or Supreme Court but was first suggested in the petition for re-hearing, is untenable. The reason given for this assertion by the respondent is that the rules of state practice require state constitutional questions to be raised in the trial court. Two cases are cited in support of this proposition by the respondent, *People* v. *Esposito*, 296 Ill. 535; 129 N.E. 846, and *People* v. *Pierce*, 296 Ill. 327; 129 N.E. 764. These cases do support the contention of the respondent that the unconstitutionality of a state law must be raised in the trial court but astute counsel overlooked the fact that these cases were decided in 1921 by the Supreme Court of Illinois, and that in 1929 the doctrine was overruled in *People* v. *Borgeson*, 335 Ill. 136-144 and *People* v. *Clardy*, 334 Ill. 160-163. The *Pierce* and *Esposito* cases were specifically referred to by the Supreme Court in *People* v. *Borgeson* (p. 144) where the court states:

> "This court rendered a decision at the February term, 1929, in *People* v. *Clardy*, 334 Ill. 160, to the effect that where the defendant is sentenced under the provisions of a void or unconstitutional act or under an indictment that did not state an offense under our

law, he was entitled to prosecute a writ of error to have that judgment reviewed, and that this court would have jurisdiction of the case under an assignment of error that the act under which he was sentenced was unconstitutional. If the act under which defendant was punished in this case was unconstitutional or void there was no authority whatever conferred on the court to enter a judgment and sentence against him, even on a plea of guilty, **and defendant had the right to prosecute his writ of error to this court although the question of the constitutionality of the act was not presented to the lower court.**" (Emphasis ours.)

We will not state that counsel for the respondent is unfamiliar with the decisions of the State of Illinois, but that, in citing cases which have been later overruled by the Supreme Court, he neglected to refer to his citator.

It further appears that the respondent has overlooked the cases cited by the petitioner in his petition (p. 7) which hold that a federal question may arise in the highest court of the state by the total disregard of the well settled rights of a citizen, although no mention was made of the same in the trial court.

The Supreme Court of Illinois in *Gillespie* v. *People*, 188 Ill. 176, 182-183, 58 N.E. 1007, 1009—52 L.R.A. 283, 80 Am. St. Rep. 176, in construing the Bill of Rights of the State of Illinois (p. 182) Sec. 1 and 2 of Art. 2 and Sec. 22 of Art. 4 of the State Constitution, compares the terms, "life", "liberty" and "property", with the same terms as used in Sec. 1 of the Fourteenth Amendment of the Federal Constitution and states (pp. 182-183):

"The terms 'life', 'liberty' and 'property', are representative terms, and intended to cover *every right*, to which a member of the body politic is entitled under the law.

> These terms include the right of self-defense, freedom of speech, religious and political freedom, exemptions from **arbitrary arrests**, the right freely to buy and sell as others may. Indeed they may embrace all our liberties, personal, civil and political, including the rights to labor, to contract, to terminate contracts, and to acquire property. **None of these liberties and rights can be taken away except by due process of law.** (2 Story on Const.—5th Ed.—Sec. 1950.)" (Emphasis ours.)

Although we do not believe it necessary to extend argument on this point, we feel it fitting and proper to state that if the Assignment of Errors Nos. 1 and 6 (Rec. 21) are meritorious, then a state and federal question were raised by the facts alleged therein, and rights claimed under the Fourteenth Amendment of the Federal Constitution and the Bill of Rights of the Illinois Constitution were drawn into question and decided adversely to the petitioner. The bare assertion that his constitutional rights were violated without stating acts and facts would have been without avail. *Virginia* v. *Rives*, 100 U.S. 313, 323, 25 L. Ed. 667.

Double Citizenship.

The petitioner, being a citizen of the United States and of the State of Illinois, owes allegiance to both of these governments, and, within their respective spheres, must be obedient to the laws of each. In return he is entitled to demand protection from each within its own jurisdiction (11 C.J. p. 776, Sub. Sec. 3). The petitioner residing in the State of Illinois, is presumed to be a citizen of the State of Illinois and of the United States (11 C.J. p. 786, par. 21), being a citizen of the State of Illinois he had a right to rely upon the highest court of the state to protect his rights under the State and Federal Constitutions,

and to apply the same law to him as applied to all other citizens under similar circumstances, and when the highest court of the state failed to apply the same principles of law to his case as to all other cases in regard to the arbitrary and illegal search of his person, search of his automobile, and his illegal arrest on suspicion, he then had a right to apply to this Honorable Court as he had been denied the "due process of law" and the "equal protection of the laws."

The question presented in the instant case by the opinion and decision of the Supreme Court of Illinois in holding that the search and arrest of the petitioner, as described in the petition herein, on bare suspicion, is valid, when in all other cases it has held such search and arrest invalid and illegal, is tantamount to hold that one party is entitled to certain rights and benefits of certain modes of procedure, and that another party similarly situated is not entitled to them. If an Act of the State Legislature so held, there is no question that such an Act would be challenged on the ground of unjust discrimination against a citizen of the United States, and denial to him of the equal protection of the laws. *Backus* v. *Fort Street Union Depot Company*, 169 U.S. 557-571, *Chicago, Burlington and Quincy Railroad* v. *Chicago*, 166 U.S. 226, 241, 41 Law Ed. 976, 17 S. Ct. 581, 149 Ill. 547, 37 N.E. 78.

In *Virginia* v. *Rives*, 100 U.S. 313, this Honorable Court has expressly stated (p. 322):

> "Denials of equal rights in an action of the Judicial Tribunal of the state are left to the revisory powers of this court."

The petition to suppress was not answered and the facts as stated must be taken as admitted. The testimony of the Police Officer on the hearing of the Motion to Suppress, that the search of the person of the petitioner, resulted in

the taking of a key belonging to the petitioner, the unlocking of the trunk on the rear of the automobile of the petitioner, the searching of the trunk, after the same had been unlocked; the finding of goods in the trunk, which later were found to be contraband, and the arrest of the petitioner, all were on *bare suspicion*, without warrant or process of law, is not denied and therefore must stand admitted.

The highest court of the state in all other similar cases having held such search and arrest to be illegal and violative of the "due process of law" clause of the Constitution, in failing to so hold in this case is a plain denial of the equal protection of the laws and the due process of law, clauses of Section 1, of the Fourteenth Amendment of the Federal Constitution as well as the due process of law, clause of the State Constitution. An American citizen has a right to apply for relief to this court for a violation of the constitutional provisions made by the Judicial Tribunal of the state. Such violations generally arise after a citizen has exhausted his remedies in the highest courts of the state, as was done by the petitioner in the case at bar.

This Court in *Virginia* v. *Rives*, 100 U.S. 313, 319, states:

> "By the violation of the constitutional provisions, when made by the Judicial Tribunal of a state, may be and generally will be, after the trial has commenced, it is then, *during or after* trial, that denials of a defendant's right by Judicial Tribunal occur. Not often until then. *Nor can the defendant know until then* that the equal protection of the laws will not be extended to him. Certainly until then he cannot affirm that it is denied, or that he cannot enforce it, in the Judicial Tribunals.
>
> "It is obvious, therefore, that to such a case—that is, a judicial infraction of the constitutional inhibitions, after trial or final hearing has commenced,—

> Sec. 641, has no applicability, and was not intended to reach such cases. **It left them to the revisory power of the higher courts of the state and ultimately to the review of this court.**" (Emphasis ours.)

It is obvious that the petitioner could not know in advance that the highest court of the state would deny to him the due process of law and the equal protection of the laws until its final decision.

The norm of this doctrine is clearly enunciated by Mr. Justice Clifford in a concurring opinion (*Virginia* v. *Rives*, 100 U.S. 334) in which he states:

> "The action of the Judicial Officer in such cases, where the rights of a citizen under the laws of the United States are disregarded, may be reviewed and corrected or reversed by this court."

The case of *People* v. *Snyder*, 279 Ill. 435, 117 N.E. 119, cited by the respondent in its answer (p. 3) is not in point, the petition for rehearing in that case, raised a question of the exclusion of certain impeaching evidence. Such is *not* the case at bar.

III.

Respondent states under point II of its Answer, reception in a state court of evidence which has been *illegally obtained*, violates no federal constitutional right of the accused.

The respondent states that the Sixth Amendment to the Constitution which prohibits unreasonable search and seizures is not suggested by the petitioner. Again the astute counsel is in error as the Fourth Amendment of the Federal Constitution prohibits unreasonable searches and seizures.

Respondent then undertakes to show that in jurisdictions **other** than the State of Illinois and the Federal Courts, evidence *illegally* obtained is competent against the accused. The case at bar is from the State of Illinois, and it is admitted by the respondent that evidence illegally obtained, under the constitution of the State of Illinois **is not competent or admissible against the accused, in a criminal case,** when timely application is made to suppress the same. The undisputed evidence of the arresting officer shows that the evidence complained against was illegally seized (Rec. 8); it further shows that timely objection was made before trial by petition and motion to suppress (Rec. 5, 6).

The cases cited in the petition for Writ of Certiorari, in the instant case, (P. 6) clearly show that in all other cases of a similar nature the highest court of the state of Illinois has held, that a denial of a motion to suppress evidence illegally obtained when timely made, is a denial to the defendant of due process of law and the equal protection of the laws.

In a recent case decided by the highest court of Illinois, *People* v. *Martin*, 382 Ill. 192, the court again sustained the norm and held that a denial of a timely made motion and petition to suppress evidence illegally obtained, violated the state constitutional provisions in Art. 2, Section 6 and the Fourth Amendment of the Federal Constitution as the provisions of both constitutions by construction had the same effect and followed the decisions of this Honorable Court in holding that evidence illegally obtained cannot be used against an accused if a motion to suppress is timely made. The court quotes from *People* v. *Castree*, 311 Ill. 392 and states (P. 197):

> "In the case of evidence obtained by unlawful search and seizure, the same *may not be used* in the trial of the cause if a motion is made in apt time to suppress the evidence and return it to the defendant."

"In that case substantially all of the authorities are reviewed or commented upon, and while conceding there are some jurisdictions in which a different rule prevails, **the one above is definitely adopted by the court,** and adhered in subsequent cases where the same or similar questions were involved.

"The similarity of the provisions of the constitution of the United States with that of Illinois, makes an examination of the decisions of the United States Courts of particular interest." (Emphasis ours.)

Without regard to the rule adhered to in other jurisdictions the applicable Illinois rules of law and procedure must prevail.

This contention of the petitioner is so obvious that we will not labor the point.

IV.

The respondent states, even if the question of lawful search *were* before this Court as though, it *were* a Federal question, the judgment should be affirmed because the search was clearly lawful.

It should be borne in mind that the Petitioner was compelled to rely upon the highest Court of the State to protect his constitutional rights after the same had been disregarded by the trial court. He could not anticipate a disregard of his constitutional rights by the highest Court of the State until final judgment had been rendered on his petition for rehearing. *Virginia* v. *Rives,* 100 U. S. 313, 319.

In his petition for rehearing (Rec. 44) he calls to the attention of the Supreme Court of Illinois, the disregard of his rights under Sections 6 and 10, Article 2, of the Illinois Constitution and the Fourth Amendment of the

Federal Constitution. He also insisted that the holding of the Supreme Court of Illinois in its opinion in the instant case was contrary to the holding in other cases of a similar nature and was an unjust discrimination in the trial procedure, in the instant case, against the constitutional guarantees both State and Federal claimed by the Petitioner.

Again, the Petitioner in his petition for rehearing (Rec. 48), claimed that his rights under the Fourteenth Amendment of the Federal Constitution had been violated by the decision of the Court, in the instant case, resulting from a discriminatory withholding from the Petitioner of the application of the well settled principle of Law that, a search and arrest on "*bare suspicion*" of a citizen violated the due process of law and the equal protection of the laws.

This Honorable Court in *Hill* v. *State of Texas*, 316 U. S. 400, 406, in reversing a judgment of the highest Court of the State which had affirmed a judgment of conviction in a criminal case states:

> "But no State is at liberty to impose upon one charged with crime a discrimination in its trial procedure which the Constitution, and an Act of Congress passed pursuant to the Constitution, alike forbid. Nor is this Court at liberty to grant or withhold the benefits of equal protection, which the Constitution commands for all, merely as we may deem the defendant innocent or guilty. *Tumey* v. *Ohio*, 273 U. S. 510, 535. It is the State's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees. Where, as in this case, timely objection has laid bare a discrimination in the selection of grand jurors, the con-

viction cannot stand because the Constitution prohibits the procedure by which it was obtained. *Equal protection of the Laws is something more than an abstract right.* It is a command which the State must respect, the benefits of which every person may demand. Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving, as well as the most virtuous." (Emphasis ours.)

Much argument is devoted by the Respondent to show, although contrary to the undisputed evidence of the arresting officer, Rosensweig (Rec. 8), that the arrest was lawful and that the search of the automobile was incidental thereto. The Motor Vehicle Act (Chap. 95½, Ill. Rev. Stat. 1943, Sections 200-234) is relied upon to support the contention of the Respondent. Section 199, which precedes Section 200, in part is as follows:

"It is unlawful for any person to drive or move or for the owner to *cause* or *knowingly permit* to be driven or moved on any highway any vehicle * * * which is not at all times equipped with such lamps and other equipment in proper condition and adjustment as required in this article, etc., * * *" (Emphasis ours.)

Section 200 requires every motor vehicle to carry two lighted lamps, etc.

The undisputed evidence of the arresting officer is that the driver of the car, escaped, leaving the Petitioner sitting in the car alone (Rec. 8). There is no evidence in the Record appearing from the testimony of the arresting officer or any other witness, that the Petitioner was the *driver* of the car. There is no evidence in the Record and no attempt was made to show that the Petitioner "*caused or knowingly permitted*" the lights to be turned off by Levine, who was driving the automobile. The officer did **not state** in his testimony

(Rec. 8) that the arrest was made because the lights were out but positively states (Rec. 8), "*we stopped the car on suspicion.*" *The stopping of the car and the searching of the defendant and the car was on suspicion that he might be involved in something.* If the arresting officer had made the arrest of the defendant for any other cause than on suspicion it is reasonable to believe that the State would not have refrained from introducing such evidence. Learned counsel for the Respondent attempts to place a cause for the illegal search of the car and the illegal arrest of the Petitioner on a ground which is not supported by the testimony in the Record. I do not believe this Honorable Court will go outside of the undisputed testimony to find facts not shown by the Record (Rec. 8).

We would not extend this Brief and Reply by showing the inapplicability of the cases cited by the Respondent, except for the fact that they are so dissimilar as to warrant a brief analysis.

People v. *Swift*, 319 Ill. 359; 150 N.E. 263, involved a robbery of a Bank in the day time and no motion was made for the suppression as evidence certain money obtained by the officers, until after the trial had begun and the money was not used as evidence in the case (150 N.E. p. 265), the arrest and search were under different circumstances from the search and arrest in the case at bar.

People v. *Marvin*, 358 Ill. 426, 428, the officers had received information concerning a particular car bearing a license issued to a fictitious person. An investigation had been made, the officers had seen the automobile and the fictitious license and a month later, upon seeing the same car further investigation disclosed stolen goods in the car which were in plain view of the officers. The Court in defining a search states (p. 428):

> "A search implies a prying into hidden places for that which is concealed, and it is not a search to ob-

serve that which is open to view. A search implies an invasion and quest with some sort of force, either actual or constructive. (*Combest* v. *State*, 239 Pac. (Okla.) 936; *State* v. *Hilton*, 249 id. 1103, 110 Ore. 441.)"

In the instant case the undisputed testimony of the arresting officer (Rec. 8) clearly shows a search was made before the arrest. Both the search of the person and automobile of the Petitioner and his arrest thereafter were without legal authority as the officer has clearly stated that the searching and arresting were "*on suspicion that he might be involved in something.*"

In *People* v. *Kissane*, 347 Ill. 385, 388, a conviction for carrying concealed weapons, the arresting officer had received a description of the man who had held up the Bank two days before; the description tallied with the description of the defendant; the officer had arrested the defendant on previous occasions and knew the similarity of the description of the defendant with the alleged robber. Upon arrest of the defendant for the specific crime of the robbery of the Bank, a search followed resulting in the finding of a revolver concealed on the person of the defendant. No rebuttal evidence was given on the motion to suppress. The point raised was that the testimony of the officer was unworthy of belief. In the case at bar the testimony of the arresting officer which is undisputed clearly shows the illegality of the search and the arrest. The Respondent in its Answer (p. 8) states that the cases cited by the Petitioner on the question of infringement of constitutional rights can be fairly distinguished from the case at bar, but he makes no effort to distinguish the same. The uncontradicted testimony of the arresting officer shows that the search and arrest were "on suspicion" and not that the Petitioner was violating any law nor suspected of having committed any particular offense (Rec. 8).

People v. *Exum*, 382 Ill. 204, cited in the Answer of the respondent (p. 7) has been distinguished in the petition for rehearing filed by the Petitioner in the Supreme Court of Illinois (Rec. 37).

The key obtained by the illegal search of the Petitioner (Rec. 8) and used to unlock the trunk of the automobile are not shown to be the same keys used by the driver of the car who escaped. Whether or not the Petitioner was intoxicated at the time shots were fired by the officers (Rec. 6), it is evidenced by the fact that he was sobered up or awakened by the firing of the shots, and the undisputed testimony of the arresting officer is that the Petitioner, "fell out of the car after the car stopped" and that the car was stopped by the firing of a shot. We believe it is fair to assert that the firing of the shot either sobered the Petitioner or awakened him.

The Petitioner being a citizen of the United States and having certain constitutional rights guaranteed to him by the Fourteenth Amendment of the Federal Constitution, should not be denied a review of his case where the Record so clearly shows that his constitutional rights have been disregarded by the highest Court of the State and that his rights were claimed under the Federal Constitution.

It is respectfully submitted that this Honorable Court will grant the prayer of the Petition for a Writ of Certiorari.

Respectfully submitted,

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